79-6305

Justice Marshall

UNITED STATES SUPREME COURT

RECEIVED
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SUPREME COURT, U.S.

Robert Di Falco ~~et al,~~ Appellant

v

Commissioner of Internal Revenue
~~IRS et al~~

JURISDICTIONAL STATEMENT

(in re: 9th C.A. 79-7564)

Attached are the two pages Jurisdictional Statement as required.

Enclosed is the Appeal; Motion to proceed; letter to The Clerk of The Supreme Court.

Service by mail 5March80 on
the US Solicitor General

March 4, 1980

Respectfully Submitted,

R. Di Falco

For Appellant By Robert Di Falco
P.O. Box 574
Benicia, California 94510

JURISDICTIONAL STATEMENT

(a) There have been no opinions delivered in the courts below.

(b) This is an appeal of two cross-complaints submitted to Appeals Court. The remaining issues remain pending Judgement. The Appeal, The Answer, The Reply, have been submitted by the parties. Appellee has only partially answered some of the issues. Appellee has not answered either of the cross-complaints herein presented for Appeal.

(i) The nature of the proceeding is of The Constitution Policy, pages 7041, 7041(a), 7041(b), (pgs 8102-8104). The cross-complaints by Appellant are taken as pursuant to this Policy.

(ii) the partial judgement is dated filed 7 Feb 80. There is no order for rehearing. The notice of appeal was mailed to the 9th Court of Appeals 14 Feb 80. Copy of each attached.

(iii) Rules of The Supreme Court: Appeal from a Federal Appeals Court.

(iv) Cases sustaining jurisdiction are unknown

(v)"...validity...statute or treaty of the United States... is involved... its text shall be...verbatum":

The Constitution Policy

" We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. "

(This Constitution Policy is expanded on pages 7041, 7041(a), 7041(b))(pgs 8102-8104)

(c) "...questions..."

1.(first of the two cross-complaints being appealed-item (a) ...free copy of transcript...) pg 8098

A court file is a public record. The government receives a free copy automatically; the private party does not. The private party must pay at over $1.00 per page and the contracting transcriptionist uses almost 2 pages to type one page. In this case Appellant has shown forgery(by Appellee) and other clerical errors. The contracting, non-government, transcriptionist costs the government more dollars than the government employee transcriptions. The government employee transcriptionist is more efficient, is more faithful, is better trained, is under oath, can/does provide near perfect record at a cheaper dollar cost. Even if the government employee transcribing and providing automatic free copy costs more dollars, the perfection of the record and the optimizing of the court process is the primary objective of this Policy.

question: Is the Bench Judicial Process better served by denying any private party a free copy automatically?

question: Is the Bench Judicial Process better served by a contracting, for profit, non-government, transcriptionist or by a government employee, under oath, not for profit, directly supervised by, and responsible to, the Bench?

question: Can the court administrator deny The Constitution Policy an implicit right for a perfect public record?

question: Can the cost of the record be the primary, or ruling, reason for the method of recording and publication?

(c) 2. (second of the two cross-complaints being appealed - item (b)...motions...denied...) pg 8098

Appellant provides a legal structure that can be operated by the government or by a non-government vehicle. 9th C.A. denies both the government and the non-government. Appellant accepts denial of the government and appeals denial of the non-government vehicle.

question: Does the Constitution Policy allow whatever means are necessary, even if these means are conducted by a private citizen, to protect and/or strengthen and/or guarantee the Constitution Policy and/or the United States?

question: Can the President, via his cabinet and administration, be allowed to destroy the United States even if under the disguise of "best judgement"?

UNITED STATES CO URT OF APPEALS

FOR THE NINTH CIRCUIT

No. 79-7564

Di Falco et al, Appellant

v

Comm, IRS et al

NOTICE OF APPEAL

Notice of Appeal of this court order as filed February 7, 1980.

Appeal is by Appellant to Supreme Court.

copy mailed 14Feb80 to
Dept of Justice(Ferguson)

Respectfully Submitted February 14, 1980

R. Di Falco

by Robert Di Falco for Appellant
P.O. Box 574
Benicia, California 94510

pg 7429 pg 8094

page 8097

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DI FALCO,

Petitioner/Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent/Appellee.

No 79-7564

Tax Court #447-78
WASHINGTON, DC

ORDER

FILED

FEB 7 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

Before: KENNEDY and PREGERSON, Circuit Judges.

Upon due consideration, the court issues the following order:

→ Item (a) appellant's request for free copy of transcript is denied because appellant is not proceeding in forma pauperis.

→ (b) appellant's motions, received by the court on December 25, 1979, are denied.

→ Feb 19, 1980: Since Dec 25th is Christmas Day, the Bench must mean dated Dec 25 not "rec'd on" R. Di Falco

pg 7430 pg 8095

~~Mo Cal 1/28/80~~

page 8098

The Supreme Court's Workload: Some Thoughts for the Practitioner

By Kenneth F. Ripple

SINCE THE issuance of the controversial "Freund report" (Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573) in 1972, the long-standing debate whether the Supreme Court is drowning in its own caseload has been elevated to a new degree of intensity. The controversy over possible solutions is even more vociferous. Definitive resolution of these questions will be long in coming.

While the caseload debate has focused on the long-term institutional role of the Court in our society, the issue also presents immediate problems for today's practitioner at "Number One First Street" that have received little attention. If the members of the High Bench, or a significant number of them, perceive themselves as working under the "hydraulic pressure" of a burdensome caseload, certain practice matters, which in more tranquil times deserved no special attention, may now have become far more important to effective appellate advocacy. More precisely, albeit negatively, the bar ought to give some thought as to whether there are practice pitfalls that might be particularly devastating when seeking discretionary review before today's Court with its self-perception of being overworked.

The problem of dealing with a Court in this frame of mind is real. It is now clear that a significant number of justices are very concerned with the implications of the caseload on the daily life of the Court. (See Commission on Revision of the Federal Court Appellate System (Hruska Commission), "Structure and Internal Procedures: Recommendations for Change," 67 F.R.D. 195, 394–409 (1975).) Whether or not their apprehensions are well founded, many of the justices do consider themselves overworked. Perhaps the most significant recent manifestation of this phenomenon was the dissent of Justice White in *Brown Transport Corporation v. Atcon*, 439 U.S. 1014 (1978). Although he had declined to express an opinion on the matter in the official reports of the Court seven years earlier in *Tidewater Oil Company v. United States*, 409 U.S. 151, 174 (1972), he seized on this routine denial of certiorari to demonstrate, on the basis of one week's order list, the significant number of cases in which certiorari was denied despite an obvious need to clarify the law. The statement of Justice Blackmun to the Hruska Commission, while more personal, conveys even more sharply the effect the caseload situation can have on the judicial state of mind:

"The heavier the burden, the less is the possibility of adequate performance and the greater is the probability of less-than-well considered adjudication. Personally, I have never worked harder and more concentratedly than since I came to Washington just five years ago. I thought I had labored to the limits of my ability in private practice, in my work for a decade as a member of the section of administration of the Mayo organizations, and as a judge of the court of appeals. Here, however, the pressure is greater and more constant, and it relents little even during the summer months. One, therefore, to a large degree, relies on experience and an innate and hopefully already developed proper judicial reaction. One had better be right! Good health is an absolute requisite. The normal extracurricular enjoyments of life become secondary, if it can be said that they exist at all. What I am saying, I suppose, is that there is a breaking point somewhere at which one's capacity will be exceeded or at which one's work becomes second-rate." (67 F.R.D. at 404.)

Before exploring particular practice areas in which the current judicial preoccupation with the caseload problem might indicate the need for rethinking the methodology of petitioning the Court for certiorari, a moment's pause to recall the nature of this process and its place in the over-all work of the Court will help to ensure a balance in perspective. For the Court, deciding the fate of petitions for certiorari is, essentially, a screening function preliminary to its actual decision-making and law-shaping function. The Supreme Court of the United States is not another court of appeals and errors. The most complex problems of constitutional and statutory construction are its daily fare. The primary task of a justice is to reflect on these pressing issues and then to engage in the profound and time-consuming process of fashioning enduring principles of law. As Justice Frankfurter emphasized on more than one occasion, this sort of work presupposes a freshness of mind and adequate time for reflection and collegial discussion.

Under these circumstances it is reasonable to assume that, even in the absence of a caseload problem, the arrival in chambers of a cartload of petitions for writ of certiorari is greeted with less than great enthusiasm. Diverting attention and energy from the heady business of fashioning constitutional principles to search for the few petitions in 100 that might be deserving of plenary review is, in all probability, not a welcome respite. Indeed, as any lawyer who has engaged in detailed and complicated legal analysis and writing can testify, this diversion usually produces a psychological burden at least equal to the physical one. At any given time a single justice may have up to ten cases for which he has the responsibility to write the opinion of the Court. He probably has several others in which he is writing a separate opinion or a dissent. He must also spend hours evaluating the opinions of his brothers and deciding what position he will take in each case.

Some problem areas take on importance in an overworked Court

The attorney submitting a petition for writ of certiorari to the Court is probably in a position similar to the associate who arrives in the partner's office during the latter's last hour of preparation for trial and seeks to discuss an important point in a case to be heard six months hence. The matter is important, the partner is interested, and an immediate answer may be needed, but the interruption is hardly a welcome break. If the partner must divert his attention for the moment, he will expect the associate to conduct himself so as to conserve time and energy without sacrificing accuracy or, ultimately, quality of decision.

Many fine articles deal with the various precise litigation techniques that contribute to the writing of a successful petition. (For example, see Prettyman, "Petitioning the United States Supreme Court—a Primer for Hopeful Neophytes," 51 *Virginia Law Review* 582 (1965).) The following paragraphs do not walk that well-trodden ground again. Rather, on the basis of a reading of several thousand petitions filed during the last decade, I will make an attempt to isolate problem areas that appear to take on a heightened importance in dealing with a Court which, to a significant degree, considers itself overworked.

1. A substantial number of petitions fail to make obvious to the reader the gravamen of petitioner's complaint. A busy justice ought to be told in direct, explicit language why the case is worthy of plenary review. The "question presented" should be informative. It must fairly tell the reviewing justice the essential nature of petitioner's contention and the federal ground on which he relies. Rule 19 of the Supreme Court Rules sets forth the basic criteria for granting a writ of certiorari, yet a surprisingly large number of petitions do not tell the Court precisely why the litigation at issue falls within those standards.

2. Many petitions fail to tell the Court why the issue presented must be resolved now. Screening petitions for certiorari is a priority-setting process. The law is filled with ambiguity and conflicts. There are few, if any, perfect trials. If an already overworked justice is asked to add another item to his work list, it seems reasonable for him to expect to be told why the issue cannot wait for another day.

3. A significant number of petitions represent to the Court that the case raises an important issue but supply the reader with few of the "operative facts" in the record that support the submission. Is it reasonable to ask a justice to allot one of the prized slots on the argument calendar to a case which, on later review, may not even raise the issue on which certiorari was granted? Indeed, in this day of increased volume, it is probably particularly important to tell the justice, by citation to the record, the precise source of each fact on which the petitioner relies.

4. Many petitions still submit a "laundry list of errors." A justice who feels he already has too much work before him is hardly going to appreciate a suggestion that he put off further work in a case like *Bakke* in order to consider whether, in your case, the trial court permitted opposing counsel to exceed the scope of direct examination.

5. Many counsel fail to address explicitly and frankly all "preliminary questions" such as timeliness, jurisdiction, and mootness. With room for only 150–200 cases on the term's argument docket, it seems to be asking too much of the Court to consider seriously a case that may later have to be dismissed without reaching the merits. If the case appears procedurally "shaky," the Court may well decide to wait until the issue arises in a more stable litigation environment.

6. A surprisingly large number of petitions repeat the obvious *ad nauseam*. Most, if not all, members of the Court accept without argument such truisms as "The First Amendment is a cornerstone of our political freedoms." It is difficult to see any value in string cita-

tions supporting a basic procedural point. It is easy to see, however, how these trappings might make it more difficult for the justice to identify the basic message quickly and to evaluate it comprehensively.

7. Finally, it is worth considering briefly the effect of nonconformity with even the "minor" procedural rules on the quality of the screening function. For instance, to a justice faced with the task of reading several hundred petitions in any given month, counsel's nonobservance of the rules of court with respect to type size or indexing may be more than a minor irritant.

When the Court selects a particular case as a vehicle to decide an issue, it also selects, necessarily, counsel to assist in its exploration of all the ramifications of that issue. Again, it is safe to assume that a justice who perceives himself and his Court as overworked is looking for help—not an opportunity to "pull teeth." Since a particular "cert-worthy" issue rarely appears only once, the Court can usually wait for a better presented case containing the same issue. Chances are that it will not have to wait very long. Despite these rather obvious considerations, counsel often end up in pitfalls which, before an already harassed Court, seem bound to affect the Court's estimation of their ability to assist it and which may even destroy long-term credibility.

For instance, while most counsel would not deliberately misrepresent the holdings of the lower courts, even a sampling of the petitions filed with the Court demonstrates a tendency on the part of some advocates to give something less than a totally objective rendition of the opinions of those tribunals. Of course, the Court has those texts before it. If counsel contends that a point was raised below when a fair reading of the opinion indicates it was not, if he mischaracterizes the holding of the intermediate appellate court, or if he does not mention an important fact specifically found by the trial court, he will surely be discovered by one, if not more, of the justices. The resulting credibility gap may well doom the petition, and perhaps the lawyer!

An even more common "credibility pitfall," easily observable in any random sampling of petitions, is the tendency of many lawyers to overstate the legal merits of the case. A particularly common device, which is probably especially costly in terms of expended judicial energy, is to argue that there is disagreement among the circuits when, in fact, no square conflict exists. To discover this ploy only after time-consuming independent research must make a justice wonder what other surprises are in store for him if the case is placed on the calendar for plenary review.

In many respects avoidance of these problem areas is simply a particular application of the lawyer's obligation under Ethical Consideration 7-36 to "be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears." There are, however, more indirect ways, also grounded in ethical considerations, by which individual practitioners can relieve the justices of some of the more fatigue-producing elements of their daily workload. E.C. 7-38 requires that a lawyer "be courteous to opposing counsel. . . . He should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow the local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments."

How can the workload problem be alleviated?

A brief survey of any Monday morning order list will disclose a significant number of "Orders in Pending Cases" that probably were resolvable by counsel themselves without consuming the energy and the time of the Court. Many similar matters regularly occupy the attention of the Court, individual justices, or its officers but are so minor that they do not even find a place on the order list. Nevertheless, these "mini-cases" have the potential to take on a life of their own and therefore compound the distraction factor in the screening process.

For instance, confronted with a request to consent to the filing of an amicus curiae brief, counsel may find that he has an obligation to his client to refuse this consent and to oppose any motion for leave to file. Barring an obligation to the client, however, counsel should give consideration to the implications of requiring the Court to clutter an already crowded conference table with such a matter. Similarly, in litigation with several parties on one side, even if counsel decides to ignore the Court's admonition that divided arguments are not favored, recourse to the Court to settle disputes among counsel as to time allocation would seem to be an unwarranted imposition. An amicus who is not invited to share the time of a party ought to give some thought to these same institutional concerns before asking the Court to permit participation in oral argument.

Motions for enlargement of time within which to file certiorari also often constitute questionable uses of a justice's time. Some of these motions are entirely needless and are filed simply to supply counsel with a "comfort factor" in his office schedule. Others could certainly be filed earlier and therefore obviate the necessity of the justice's considering whether the request is justified by what Rule 34(2) terms "the most extraordinary circumstances." In short, enlargements of time should be requested only when actually necessary; however, they should be sought as soon as a concrete need is recognized.

Long-term resolution of the Supreme Court's workload problem may well require some jurisdictional restructuring, but to a significant degree the immediate problem can, in all likelihood, be temporarily alleviated by more scrupulous adherence to the norms of good practice in the certiorari procedure and by the Court's more rigorous enforcement of its own rules. Dissatisfaction in the bar about the Court's failure to identify, through the screening process, the important issues in any particular area of law certainly ought to begin with a self-examination of the current style of practice before the Court. A busy Court needs help. A justice who perceives himself as deluged in paper is looking for help. The lawyer who provides it, through a frank, nonsense style of practice, fulfills his professional obligation to the Court and, in all probability, greatly enhances his client's chances for success.

(Kenneth F. Ripple is an associate professor of law at Notre Dame Law School and the director of the Thomas J. and Alberta White Center for Law, Government, and Human Rights at Notre Dame. He also serves as reporter to the Committee of Judicial Conference of the United States for study and revision of the Federal Appellate Rules. The opinions expressed in this article are solely those of the author.)

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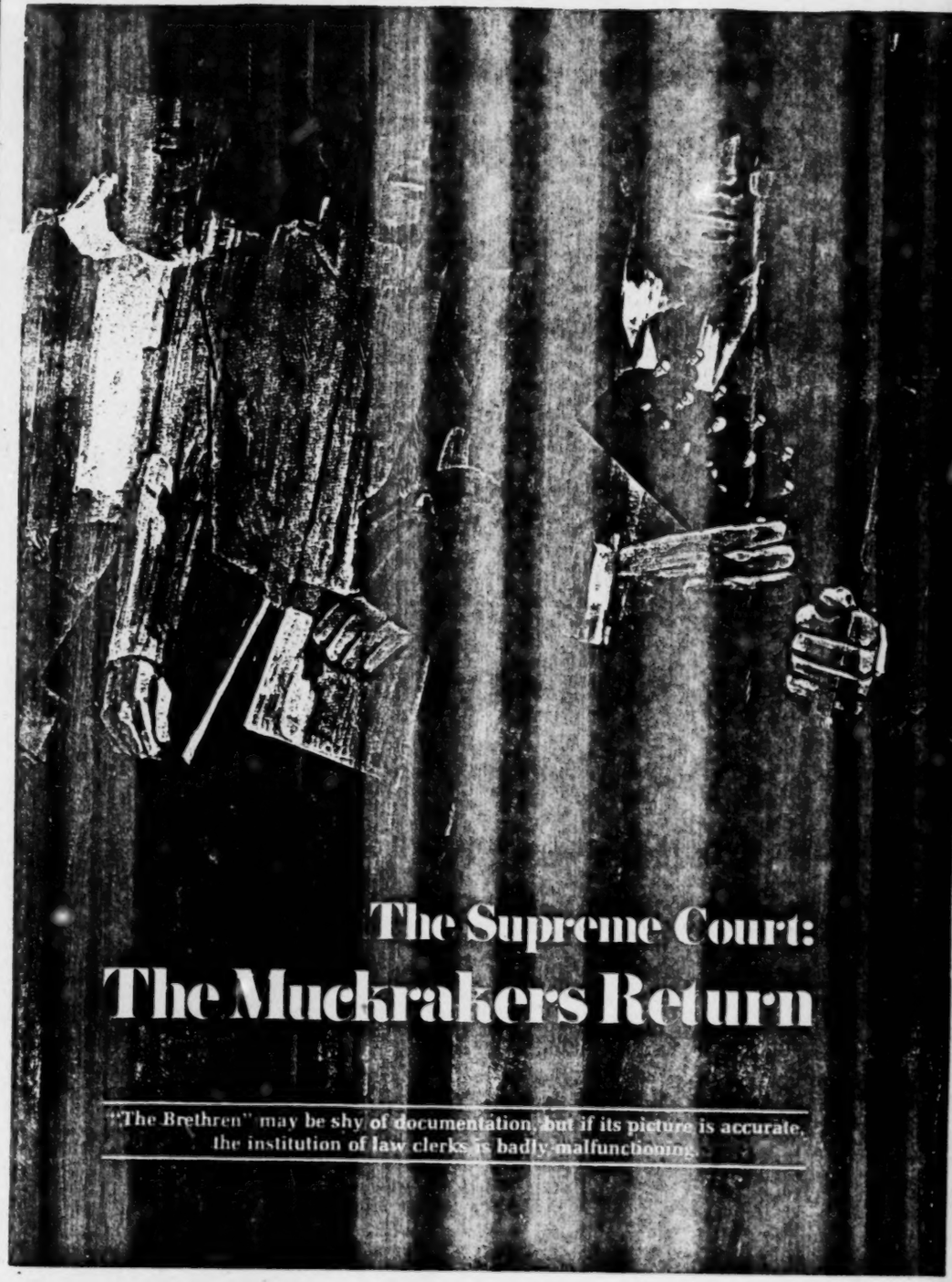

The Supreme Court: The Muckrakers Return

"The Brethren" may be shy of documentation, but if its picture is accurate, the institution of law clerks is badly malfunctioning.

"The Supreme Court": The Muckrakers Return ("The Brethren" may be shy of documentation, but if its picture is accurate, the institution of our courts is badly malfunctioning)

By John P. Frank

MUCKRAKING has a long, honorable, and useful tradition in American history. It began in the early 20th century and devoted itself to exposing the underside of American institutions and personalities. Leading exemplars were Ida Tarbell on Standard Oil, Lincoln Steffens on municipal corruption, and Upton Sinclair on the food industry. A leading publication was *McClure's* magazine.

The Supreme Court was subject to attack and debate in the same pre-World War I era, but more on the merits than by exposé. Theodore Roosevelt and Bob LaFollette are examples of those who attacked some decisions of the Court. Muckraking full style did not reach the Court until the publication of *Nine Old Men*, by Drew Pearson and Robert Allen, during the severe national debate over the Court in the mid-1930s. At that point systematic attacks on individual members gave the book its sales value.

A current work, *The Brethren*, by Bob Woodward and Scott Armstrong (Simon and Schuster, 1979), is to a degree in this tradition, but it departs in two conspicuous aspects. Early 20th century muckraking was undertaken for a definable social purpose; it was an adjunct of the Progressive movement and generally was aimed at improving social conditions. The work of Upton Sinclair, for example, led to the Pure Food and Drug Act of 1907. These works attempted to be straight reports. The Pearson and Allen book was aimed at support for Franklin D. Roosevelt's attack on the extreme conservatism of the Court of that time.

The Brethren has no apparent social orientation; it purports to be reporting for its own sake, but it also has a considerable quota of "creative composition" that is not accurate historiography.

The book itself is a mix. Its underlying structure is a review of key cases of seven terms, 1969–75, of the Supreme Court. Since it is only lightly annotated, we have no real way of evaluating the sources, and if we are to accept the volume, we must do so on the happy assumption that it is revealed truth. There are documents quoted that have a high likelihood of being valid. There is also the extensive product of interviews of anonymous law clerks. These are in some cases as to minor episodes almost ten years old, so we may have doubts as to the precise accuracy of quotations recollected. We have no way of knowing either their general validity or the accuracy of their reporting.

There is also a considerable mix of plain historical fiction. The book has the momentum of an oracle speaking, and so when marginal and small details are tucked in, one may be inclined to accept without wondering whether the observation is in fact true.

To give a few examples, on June 3, 1969, at Chief Justice Burger's confirmation hearing, we are told (page 24) that Senator Eastland asked some questions and then, passing the questioning to the next senior Democrat, "'Senator Kennedy, Eastland mumbled.'" "'No questions, Mr. Chairman,' Kennedy replied in his confident Boston accent."

I pause at this exchange deliberately because it is minute and of no consequence, but carried through over and over again, it gives color to the work. These words in fact were uttered by those senators, but I know of no record from which it is possible to know whether Senator Eastland "mumbled," spoke with clarity, or simply made a toneless observation. Since Senator Kennedy has only one way of speech, it seems probable, if those four words are capable of bearing much accent at all, that whatever he said was in a Boston accent. But I know no way of demonstrating whether he spoke in a "confident" or colorless or some other tone. I very, very much doubt whether the authors have any better evidence on this trifling point.

We deal with a contemporary manifestation of differing schools of historiography. Herodotus, a founding technical historian, thought it proper to supply by imagination what he considered probable but could not know as a matter of fact. Later generations of historians for the most and better part have been of harder stuff. Woodward and Armstrong go with the earlier approach. Illustrations: on a particular case, we are told that Justice Stewart saw fit to circulate to his colleagues copies of certain memos of his clerks without distributing a memo of his own. This, it is implied, was done to avoid the necessity of taking a position; he would be proceeding "without risk to Stewart" (301).

This kind of recitation of interior monologue is something that the authors could not possibly know. Stewart, as suggested, may have chosen this device for some protective purpose of his own. Knowing Justice Stewart, I regard this as improbable in the extreme; but perhaps. He also may have supposed that there were enough judicial memos in circulation and that his working papers would serve usefully as supplements. He may have had some other purpose altogether. He may have responded without any particular thought. The point is that the authors assert fact without any possible way of knowing whether it is fact or fiction.

At a conference on the *Watergate Tapes Case*, we are told, Justice Brennan proposed that all of the judges sign the opinion. No one agreed with him and, we are told, "Brennan felt betrayed, figuring he was like one of the Watergate figures, left to twist slowly in the wind" (309–10).

We are now being told what went through Justice Brennan's mind at a particular point in time. Unless Justice Brennan himself made some declaration of his thought process that is available to these authors, that statement can escape being fiction only by coincidence. A little later, the same case, when Chief Justice Burger received a certain memorandum from Justice Brennan, we are told that the chief justice thought to himself, "only Brennan would be so presumptuous" (313).

This is a clear statement that at a particular point in time Chief Justice Burger paused for a moment, made a comparative judgment as to the degree of presumptuousness of his colleagues, and came to a particular conclusion, giving Justice Brennan the award as the most presumptuous. The preface to the volume tells us that the authors "have attributed thoughts, feelings, conclusions, predispositions and motivations to each of the justices. This information comes from the justices themselves, their diaries or memoranda, their statements to clerks or colleagues, or their positions as regularly enunciated in their published Court opinions." One could risk a pretty fair wager that none of those sources will sustain the existence of the fleeting thought here attributed to the chief justice.

Another illustration, also from the tapes case, involves the justices going over a draft at the conference. Justice Brennan says something, while his mind is elsewhere. He is thinking that "had the opinion been in the hands of a more capable man, this would never have happened" (345). The chief justice also is thinking that "Powell was acting like a spoiled child."

One more example of "recording" what someone thought at a particular moment: We are told that Justice Rehnquist was dissatisfied with a particular assignment from the chief justice. "He suspected that the assignment was Burger's way of telling him what he really thought of the Christmas party" (412), an allusion to a social event which allegedly dissatisfied the chief justice.

This is presented straightfaced. It assumes (a) that the chief justice was dissatisfied with the Christmas party or, at least, that Justice Rehnquist thought so; (b) that Justice Rehnquist supposed that an assignment of a burdensome and uninteresting case was made as a sort of a retaliation for a poor social experience; and (c) that Justice Rehnquist said this to someone who repeated it to the authors. Maybe so, but my own credulity just snapped.

The plain truth is that neither we nor the authors nor, we suspect, the justices in question have any possible way of knowing what they may have been thinking. For all we can possibly know, they may have been thinking that the chairs were unduly hard or wondering whether the coffee was still hot. This, we must believe, is purest historical fiction.

The resulting product is a witch's brew stirred with a good deal of malice.

1. Chief Justice Burger is described as stupid (repeatedly), inept, incompetent, devious, and asinine. He is the evil genius of the institution over which he presides.

2. Justice Brennan is described as a self-seeking manipulator and takes the most vicious single lick of any of the justices—that he allegedly cast the controlling vote to keep a person in prison for life, despite his total belief that the conviction was erroneous, in order to conciliate another justice and get that justice's vote on some unrelated case (225). Justice Brennan has his detractors as well as his supporters. As one who has been an unswerving admirer of this good man since he stood up to Senator McCarthy over outrages in his native New Jersey in the 1950s, I personally believe this account to be a damnable lie. After 31 years on the bench and votes in more than 100,000 cases, it should not be necessary to affirm that Justice Brennan votes with his conscience.

3. The Justice Stewart of this volume is a trimmer, a time server, a fearful person, a jockeyer for position. In my own sketch of this justice in *The Warren Court* (1964), I described him as "A man of strong convictions, he controls them with the spirit of fairmindedness." All actual facts adduced here confirm my original judgment.

4. Justice White comes out better than any of the others. He is thought of as harsh occasionally (quite possibly true), but he is so totally in control of his job and himself at all times that there are no personal detractions plausible enough even to be concocted. We are told that during a particular term "one of White's clerks had tried to convince Marshall's clerks that he could deliver White's vote on a certain case if Marshall would change a particular sentence" (180). If so, that was the world's dumbest clerk.

5. Justice Marshall is chalked off as a lazy boob, incapable of doing any work, and too indolent to try. I have paid my dubious respects to that kind of attack on Justice Marshall at another time in these pages (book review of *The Legal Career of Justice Thurgood Marshall*, 60 A.B.A.J. 26 (1974), and I think of him as a real hero of our day.

6. The Justice Blackmun who emerges here is an utterly indecisive flounderer, ludicrous in his treatment of his details, ill-tempered in his personal relations (181–82), a justice who "felt unworthy, unqualified, unable to perform up to standard" and apparently determined to prove it. I believe Justice Blackmun to be one of the real powers of the contemporary Court and give the details in support of this view in a forthcoming paper in *Law and Contemporary Problems*.

7. Justice Powell, except when he is being a tool of big business for which he has a fixed (but undemonstrated) affinity, is thought of by these authors as a wobbler: this is the justice who stood out against all eight of his colleagues to give us the nationally satisfactory solution to the tough *Bakke* problem. What I regard as one of the more improbable sentences in the book is an attribution to Powell of the observation that if he (Powell) had had an associate in the private practice who couldn't do better than Burger, Powell would fire him (284). Whatever Powell's thoughts may have been, it is absolutely beyond belief that this courtly gentleman would have made so tart a comment.

8. Justice Rehnquist is described as dishonest with legal materials, a figure to be tightly watched by his colleagues. No illustrations were given to prove the point, and I doubt that there are any.

9. Justice Stevens escapes essentially unscathed because he came to the Court too late to warrant the attention of the authors. The once-over-lightly treatment nonetheless leaves the impression of a whirling compass searching for a magnetic pole.

10. The earlier portion of the volume deals with justices no longer serving. Justice Black is described as a "blackmailer" because he very firmly held his ground when he wished to require desegregation of a school district forthwith, without any more of the interminable delays that have accompanied "all deliberate speed." The "blackmail" consisted of being intransigent and unwilling to put up with any more equivocation, waffling, and wobbling. Why this is "blackmail" and not forceful negotiation for a long-overdue result is not apparent.

The authors give us full details of the decline and falling of Justice Douglas after his retirement caused by a stroke. They have what they may well regard as their choicest tidbit at the imminent death of Justice Harlan. That fine gentleman, scholar, and lawyer was in the Walter Reed Hospital, blind and dying of cancer. Some clerk brought to Harlan an order that needed to be signed, explained it to him, and Harlan concluded to sign it. The clerk did not hold the paper securely or adequately direct the dying man's hand, and he wrote on his sheet. What a swine that clerk was if he related the episode, and what a delight these authors take in selling it!

From the purely historical standpoint, there are deficiencies, some of which have been suggested, but they are far from total. There are very real values, too. We are not told where the memoranda or written material come from. It is at least theoretically possible that some have been leaked by a justice; it is also possible that some were provided by clerks who kept copies of papers. In any case, clerks have described events they saw, or, as the *Wall Street Journal* put it, about which they "blabbed their mouths off." Their descriptions are probably inaccurate as to words and phrases because, unless they were contemporaneously recorded, they depend on memory of small details, but they may be correct in general drift.

This raises two questions that need to be sharply separated:

1. Should the sources have been leaked and should the former clerks have spoken?

In my view, the Court would better perform its job for the country in confidence. The leakage of conference notes is unfortunate. The job is big enough and the time in which to do it is short

Rec'd March 3, 1980 Pg 8096(a) Pg 8096(b)

enough so that the inevitable posturing for history that will result from revelation of conversations carefully kept confidential at the time is a misfortune. While as a prospective biographer, I wept a little when Justice Black in his dying days burned his more important papers, retrospect causes me to think that he was right.

On the other hand, this is not a clear-cut point of view. In an important sense the die was cast when Alexander Bickel published *The Unpublished Opinions of Mr. Justice Brandeis*, otherwise confidential papers that cast valuable light on how particular cases were decided. Bickel justified his selection of Brandeis materials by saying, "There are no trivia presented here, no casual gossip or malice." *The Brethren* is knee deep in both. Alpheus Mason in his work on Harlan F. Stone also used confidential papers.

Confidentiality has been dealt a death blow

Regarding the mold of confidentiality dented, if not broken, in the *Marble Palace* (1958), I published a letter from Justice Rutledge to me on the Yamashita case that gives the full detail of how a decision was reached from his point of view and that he obviously sent to me for the purpose of publishing at an appropriate time. I deliberately held it for a good many years after the event.

Prior to *The Brethren*, therefore, it must be regarded as on the whole an issue in tension and not quite totally resolved as to the extent to which justices themselves might appropriately keep and through their estates later reveal records concerning the operation of the Court. Any restraint on that score is quite possibly conclusively broken by this volume.

The matter of revelations by clerks, on the other hand, has no similar history. There have been no significant breaches of confidences by the young persons employed in that capacity for the 90 or so years since the custom originated. There have been anecdotes—I have published some myself and so have others—but none of these has gone to details of particular cases or to work habits and attitudes of justices as they relate to other justices.

The clerks' expressions as related in *The Brethren* range from the regrettable to the contemptible. In the extremest instance, someone attending a dinner of Chief Justice Burger and his clerks, a completely social evening occasion, regales us with details we don't need. I find it indecent to think that anyone would publish private dinner table talk in these circumstances.

The authors are sharply critical of a memorandum from Chief Justice Burger to his clerks instructing them to hold all matters within the chambers confidential, including the preliminary views of their justice, and not to discuss these outside the office (34–36).

In 1942 I received almost precisely the same instructions from Justice Black. I was told expressly that he wished to encourage the freest of discussion within the office and that he wished me to present to him any thoughts I had, no matter how much they might conflict with his own. He meant it. A phase of the deportation of the Japanese from the West Coast during World War II came up that year. My memorandum began, "This is a damned Fascist outrage," and went on to develop that theme chapter and verse. Justice Black saved that memorandum for years, showing it to subsequent generations of law clerks as an example of the candor he encouraged. At the same time, I was categorically instructed, and obeyed the instructions rigidly, that discussion stopped at the threshold of the office. From the corridor to the world over, there was one spokesman, and that was my justice. I thought that view wise, obeyed it rigidly, and still think so.

2. The point that may be obscured in evaluating *The Brethren* is that, whatever one's attitude as to whether the former clerks should have spoken, they have, and some materials, by whatever means, have been released. Discussions of the proprieties must yield to discussions of the merits of what has been learned.

This is considerable. The discussion of how some major cases were decided is in fact more information than the profession and the country have ever had before. For illustration, the details of negotiation are set out in both the school integration case from North Carolina and the tapes case. One can learn a good deal of the negotiational process within a collegial court. Unanimous opinions on great major questions are not likely to spring full blown from the pen of the first author, and pull and haul among strong and deeply convinced persons is virtually inevitable. This volume does give a picture of how persons coalesce, move toward and away from each other, and finally come to some conclusion.

The authors reflect an intense personal hostility toward Chief Justice Burger that at times becomes vicious. An illustration is the observation, "The chief had neither the capacity nor the interest to digest even the simplest cert memo" (353). While I have many basic disagreements with the chief justice on conclusions and take my constitutional faith from the line running from Black, Douglas, and Warren to Brennan and Marshall, any honest historiography requires the observation that this statement is plain silly. The chief justice may, as I think, on occasion be wrong, but he is not weak. Indeed, I recently participated in a private discussion between Chief Justice Burger and some ten law students in which I was astonished by the memory grasp of the chief of details of case after case.

The authors, in their effort to make Chief Justice Burger appear foolish, may very well have turned him into a hero for more objective historians. In the principal illustrations of negotiations given, they depict him as being outmaneuvered by brighter colleagues. They do not perceive that on great questions, in particular, the country is entitled, if humanly possible, to be given the answers in one voice. The accounts related, if accurate, reflect strong minds wrestling together until a mutually acceptable result is reached.

The Supreme Court is at its worst as a collection of soloists, yet the authors treat the decision-making process as if it were a kind of a nine-month-long football season, with winners and losers scoring points. It seems never to occur to them that the goal is to achieve consensus where possible and to reserve differences for the necessary occasions. At no place in these 444 pages do the authors appear to recognize that the issue is not whether "I win" or "You win," but "Does the country win?" The account of the negotiations, which is illuminating and a new and valuable part of this book, sheds honor on the participants.

The high value of *The Brethren* is the general light it casts on the functioning of the Court as an institution with particular reference to the function of law clerks.

The picture drawn is of a law clerk system totally out of hand. That picture may be radically inaccurate. The description of law clerk functions came to the authors from law clerks, and after the fashion of most of us, the informants well may have exaggerated their own importance. The overblown picture of law clerk functioning may have come from a few persons and may not be truly institutionally descriptive. To take but one example, I find ludicrous the notion of a law clerk's manipulating Justice White.

Let me make my own law clerk's revelation. I was a clerk to Justice Black at the October, 1942, term. During that year he passed on some 1,000 different matters. I never affected his conclusion on any one of them. I was a hard-working law clerk. The pattern was three nights a week until 10:00, one until 11:00, all day every Saturday, and some Sunday time. My justice did the first draft of every opinion except for one insignificant dissent, as I have noted elsewhere. I did the second drafts, and much of the research and footnoting went in at this stage. The opinions always went through a minimum of three and up to six or seven drafts, culminating in a word-by-word exchange between the two of us on everything in the document. Virginia law professor A.E. Dick Howard, Black's clerk, 1962–64, confirms that this description of the Black clerks' role was not materially different 20 years later.

My justice was kind enough to suggest that I filled the bill, and the conclusion not to stay another year was mine. At no point was I a mover or shaker of anything. Nor should I have been. The president appoints and the Senate confirms a mature and experienced person to be a justice of the Supreme Court. The system was not created to give to young persons fresh from law school some important decision-making power.

But that is not the picture of law clerks that emerges from *The Brethren*. I have known many, many clerks over the years, including recent times, and am sure that many of those quoted here are atypical. They suffer from megalomania.

We are told that Justice Rehnquist's clerk in one matter was so distressed with the bad performance of his justice "that he sent a personal note of apology" to the other chambers (222). The implied tone of "Dear Teacher: I am sorry that my little boy was so bad in school" is a total inversion of responsibility. Another clerk is also concerned about apologies (253). We are told that Chief Justice Burger's clerks were irate that "they couldn't negotiate with the other clerks" (36). I feel confident that if I had ever attempted to negotiate the substance of one of Justice Black's opinions with another office, he would have given me the reprimand that I deserved. A clerk refuses an assignment because he disagrees with his justice (278). Justice Powell, on one occasion in which clerks seem to have undue influence in another office, assertedly asked his own clerks, "Who is the justice down there?" (258). But nonetheless, on an extremely important matter his own clerks "still believed they could change his [Justice Powell's] position" (298). In the most magnificent assertion of excess power in the book, a clerk cut off a memorandum by Justice Stewart he had been told to distribute because he did not approve of it (319) and was later told "sharply" to get it out (323).

Clerks' negotiations become the height of instigation

Negotiations among clerks can lead to trouble. On a particular matter Marshall's clerks, "somewhat overstating Marshall's reaction," told Brennan's clerks that Marshall was "quite upset," to which they added considerable embroidery (326). Only one step remains, and before the book is done, we have that: the clerks have their own conference. Clerks from seven of the offices gather in the chambers of Justice Stewart (who was, needless to say, absent) and agreed "to mobilize" on a particular case to achieve a particular result. They decide what justice should write the opinion and which should stay out of "the fray" (375). Surely this is delusion of grandeur's finest hour.

A clerk substantially reorganized a draft by Justice Douglas, who is reported to have said, "I can see you've done a lot of work, but you are off base here. If and when you get appointed to the Supreme Court, you can write opinions as you choose" (357). This is clearly correct.

While I suspect that the combination of self-importance and extreme selectivity by the authors from among the many former clerks they interviewed makes what I have just described an overblown and exaggerated picture, there is a possibility that there is at least something to it. If there is, the institution is malfunctioning. The fear of many has been that the enormously increasing volume of work of the Court is making it impossible for the justices to tend to their business individually with the degree of personal responsibility that the immensely important business of the Court requires.

If there is anything at all to this series of anonymous anecdotes, then at least some of the justices are failing adequately to manage their own staffs. They probably have too much staff, and this is probably a by-product of an excessive workload. It calls for consideration of remedies, including possible other courts to share some part of the burden. One sheds a tear of nostalgia for the day of Justice Holmes, when a clerk was called "Sonny" and a prime function was to go for walks with his justice.

As part of its social role in American life, muckraking can be useful, and *The Brethren* ought to be.

- The justices ought to meet and unanimously decide, if possibly they can, whether they mean to operate in confidence or not. Very little but harm can come from this kind of leaked gossip; it is an intermediate solution to the problem of confidentiality that solves nothing. The process ought to be clearly open or decisively closed.
- The negotiational process, while derided here, is valuable and we need more of it, not less. The pressure of the current docket forces the Court in exactly the opposite direction, diminishing the possibility of unanimity and accelerating the need for concurrences and dissents because of the want of time to solve problems by reasoning together. While the negotiations among the justices are useful, they are also time consuming. The workload must in some fashion be cut down to that which nine justices cannot merely do but do well.
- The justices ought to consider whether the general description of clerkly functions in *The Brethren* has any validity. I am confident from having known many of them that the overwhelming number of Supreme Court law clerks are not merely able but fine and decent as well. Each justice can fairly ask himself whether the functions he is delegating to his clerks are in fact more than he means to, and, very pointedly, whether he has more clerks than he needs. The account given is an unhappy corroboration of an ancient truth: the devil finds work for idle hands to do.

(John P. Frank practices law in Phoenix. He is the author of numerous books and articles on constitutional law and the Supreme Court, including a biography of Justice Black.)

confirmed by telephone: FILED Feb 15, 1980 USCA9

RECEIVED
FEB 19 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 79-7564

Di Falco et al, Appellant

v

Comm, IRS et al

NOTICE OF APPEAL

Notice of Appeal of this court order as filed February 7, 1980.

Appeal is by Appellant to Supreme Court.

copy mailed 14Feb80 to Dept of Justice(Ferguson)

Respectfully Submitted February 14, 1980

R. Di Falco

by Robert Di Falco for Appellant
P.O. Box 574
Benicia, California 94510

pg 7429

pg 8094

pg 1 of ii

Di FALCO

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DI FALCO,

Petitioner/Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent/Appellee.

No. 79-7564

Tax Court #447-78
WASHINGTON, DC

ORDER

FILED
FEB 7 1980
RICHARD H. DEMME
CLERK, U.S. COURT OF APPEALS

Before: KENNEDY and PREGERSON, Circuit Judges.

Upon due consideration, the court issues the following order:

(a) appellant's request for free copy of transcript is denied because appellant is not proceeding in forma pauperis.

(b) appellant's motions, received by the court on December 25, 1979, are denied.

pg 7430

pg 8095

pg ii of ii

Mo Cal 1/28/80

79-6305

UNITED STATES SUPREME COURT

RECEIVED
MAR 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Di Falco et al, Appellant

v

Commissioner of Internal Revenue Service(IRS) et al

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

attached: Affidavit In Support of this Motion

Appellant Motions for leave to proceed in forma pauperis.

Affidavit in support of this Motion is attached.

Service by mail on The Solicitor General, Department of Justice, Washington, D.C.: (1) mailed March 17, 1980 (2) affidavit of service attached.

Respectfully Submitted,

March 16, 1980

R. Di Falco

For Appellant by Robert Di Falco
P.O. Box 574
Benicia, California 94510

UNITED STATES SUPREME COURT

RECEIVED
MAR 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Di Falco et al, Appellant

v

Commissioner of Internal Revenue Service et al

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I say that in support of this motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I am entitled to redress; and that the issues which I desire to present on appeal are; from 9th C.A. Order filed 7Feb80; items (a) and (b);

item (a) involves corrective administrative proceedure by the court administrators;

item (b) involves assets of the United States.

I further swear that the response which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. "are your presently employed?"

No.

Last employment was February 1979; earned approximately $1,000.

2. "Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other source?"

No, except; within the past twelve months my only income has been my Veterans Administration Disability

of $252 per month; $100 per month paid to child support per court order leaving $152 per month.

3. "Do you own any cash or checking or savings account?"

Own the above cash ($152/month). Have no savings account. Joint checking account with my wife, the account is for her deposits to pay bills. I rarely have any of my money in this account. I sign checks for her.

4. "Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?"

I own no assets.

5."List the persons who are dependent upon you for support and state your relationship to those persons."

Although my wife and our daughters are dependent on me, my wife supports us, and I pay child support from the prior marriage per court order.

Wife- Anne

Daughter-Kimberly

Daughter-Allyson

The court ordered my three older children removed from child support(overage)(last year) reducing child support payment to two remaining child support children:

Daughter-Lisa

Peter-Son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

My Veterans Administration Disability is being evaluated as to further rehabilitation and as to rating. The disabilities are the result of enemy bomb explosion causing multiple wounds, fractures, etc.(USMC; Korean Combat; Purple Heart)(Battle Star).

UNITED STATES SUPREME COURT

MOTION AND AFFIDAVIT

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Robert D. Falco

INDIVIDUAL ACKNOWLEDGMENT

State of California
County of Solano } S.S.

On this 17th day of March 1980, before me, Eleanora D. McDonald a Notary Public in and for said Solano County, personally appeared Robert D. Falco

known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

(SEAL)

OFFICIAL SEAL
ELEANORA D MC DONALD
NOTARY PUBLIC - CALIFORNIA
SOLANO COUNTY
My comm. expires OCT 27, 1983

WITNESS my hand and official seal.

Eleanora D. McDonald

Notary Public in and for said Solano County and State

My commission expires 10-27 1983

P-1000 8-79

2. Notice of Appeal pg 8097

3. copy of 9th C.A. items (a),(b); pg 8098

enclosed:

1. letter from Ms. McFarland dtd March 11, 1980

2. my letter to Ms. McFarland dated March 16, 1980

3. Affadavit of Service, per instructions

by Ms. McFarland.

Justice Marshall

UNITED STATES SUPREME COURT

Di Falco et al, Appellant

v

IRS et al

MOTION
1. to proceed
   a. in forma pauperis, or,
   b. at no cost

Motion is by Appellant to proceed in this Court in either forma pauperis, or, at no cost: Appellant to submit one copy to the clerk and one copy to Solicitor General,and, to incur or pay no other costs.

9th C.A.(79-7564) order filed 7Feb80, attached, issues (a) and (b), are only two of the many issues. The remaining issues are pending.

issue (a) involves corrective administrative proceedure by the court administrators.

issue (b) involves assets of the United States.

Congress has Legislated in Title 26(internal Revenue Code); section 162: "...there shall be allowed...expenses... incurred or paid...in carrying on...(e)...with respect to legislation ..." Congress recognizes, legislates, the expenses of operating the government is incurred by the government.

AFFIDAVIT FOR MOTION TOAPPEAL IN FORMA PAUPERIS

I say that in support of this motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I am entitled to redress; and that the issues whcih I desire to present on appeal are as in the above motion

1. "Are you presently employed?" NO. Last employment was February 1979, earned approximately $1,000
2. Within the past twelve months my only income has been my Veterans Administration Disability of $252 per month, $100 per month paid to child support.
3. No savings account. Checking account with my wife-- the account is for her deposits to pay our bills. I rarely have any of my money in this account. I sign checks for her.
4. I own no assets.
5. Although my wife and our daughters are dependent on me, my wife supports us, and I pay child support from the prior marriage per court order.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalities for perjury.

R. Di Falco February 25, 1980

Robert Di Falco: P.O. Box 574; Benicia, California 94510

UNITED STATES CO URT OF APPEALS

FOR THE NINTH CIRCUIT

No. 79-7564

Di Falco et al, Appellant

v

Comm, IRS et al

NOTICE OF APPEAL

Notice of Appeal of this court order as filed February 7, 1980.

Appeal is by Appellant to Supreme Court.

copy mailed 14Feb80 to
Dept of Justice(Ferguson)

Respectfully Submitted February 14, 1980

R. Di Falco

by Robert Di Falco for Appellant
P.O. Box 574
Benicia, California 94510

pg 7429 pg 8094

page 8097

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DI FALCO,

Petitioner/Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent/Appellee.

No.79-7564

Tax Court #447-78
WASHINGTON, DC

ORDER

FILED

FEB 7 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

Before: KENNEDY and PREGERSON, Circuit Judges.

Upon due consideration, the court issues the following order:

Item (a) appellant's request for free copy of transcript is denied because appellant is not proceeding in forma pauperis.

(b) appellant's motions, received by the court on December 25, 1979, are denied:

Feb 19, 1980: Since Dec 25th is Christmas Day, The Bench must mean dated Dec 25 not "rec'd on" R. Di Falco

pg 7430 pg 8095

~~No Cal 1/28/80~~

79-6305

UNITED STATES SUPREME COURT

RECEIVED
MAR 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Di Falco et al, Appellant

v

Commissioner of Internal Revenue Service et al

AFFIDAVIT OF SERVICE UPON THE SOLICITOR GENERAL OF THE UNITED STATES

This is an affidavit of service upon the Solicitor General of The United States.

I hereby swear that I have, and will, service of all briefs, pleadings, notices and papers, upon The Solicitor General Of The United States, Department of Justice, Washington, D.C. 20530, by mail.

I understand that a false statement or answer in this affidavit will subject me to penalties for perjury.

Robert Di Falco

Robert Di Falco

INDIVIDUAL ACKNOWLEDGMENT

State of California
County of Solano } S.S.

On this 17th day of March 1980, before me,

Eleanora D. McDonald, a Notary Public in and for said Solano County,

(SEAL)

personally appeared Robert Di Falco

known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

OFFICIAL SEAL
ELEANORA D MC DONALD
NOTARY PUBLIC - CALIFORNIA
SOLANO COUNTY
My comm. expires OCT 27, 1983

WITNESS my hand and official seal.

Eleanora D McDonald

Notary Public in and for said Solano County and State

My commission expires 10-27-1983

P-169 5-79